Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. THOMAS P. KOSEK, Defendant.	No. CR99-3029-MWB **ORDER REGARDING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE**

TABLE OF CONTENTS

I. INTRODUCTION AND FACTUAL BACKGROUND

On November 17, 1999, a single-count indictment was returned against defendant Thomas P. Kosek, charging him with conspiracy to distribute and possess with intent to distribute approximately 50 grams of methamphetamine, in violation of 21 U.S.C. § 846. Defendant Kosek entered a plea of guilty and was subsequently sentenced to 148 months imprisonment. Defendant Kosek did not appeal his conviction. Instead, defendant Kosek filed his current motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. In his motion, Kosek challenges the validity of his conviction on two grounds: 1) ineffective assistance of his counsel; and 2) that he was incorrectly sentenced as a career offender. Defendant Kosek subsequently amended his § 2255 motion to assert a third issue: that he was incorrectly sentenced for a schedule II controlled substance.

II. LEGAL ANALYSIS

A. Standards Applicable To § 2255 Motions

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as "the statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose of the statute:

> [Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was 'imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized

by law, or is otherwise subject to collateral attack.'

Id. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to § 2255 may not serve as a substitute for a direct appeal, rather "[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant's ability to raise that issue for the first time in a § 2255 motion. *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998); *Bousley v. Brooks*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152 (1982)). This rule applies whether the conviction was obtained through trial or through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews*, 114 F.3d at 113; *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997) (per curiam). A defendant may surmount this procedural default only if the defendant "'can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.'" *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

B. Analysis Of Issues

None of the claims defendant Kosek has presented in his § 2255 motion were raised on direct appeal. Defendant Kosek alleges that the reason for his failure to appeal these

issues was ineffective assistance of counsel. The ineffective assistance of counsel may constitute "cause and prejudice" excusing the procedural default of his failure to assert the claim on direct appeal. *See Tokar v. Bowersox*, 198 F.3d 1039, 1051 (8th Cir. 1998), *cert. denied sub nom. Tokar v. Luebbers*, 531 U.S. 886 (2000); *Boysiewick v. Schriro*, 179 F.3d 616, 619 (8th Cir. 1999). Moreover, claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings under 28 U.S.C. § 2255. *See United States v. Martinez-Cruz*, 186 F.3d 1102, 1105 (8th Cir. 1999) (reiterating that ineffective assistance of counsel claims are best presented in a motion for post-conviction relief under 28 U.S.C. § 2255); *United States v. Mitchell*, 136 F.3d 1192, 1193 (8th Cir. 1998) (noting ineffective assistance of counsel claims more properly raised in 28 U.S.C. § 2255 motion) (citing *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995) (stating ineffective assistance of counsel claims "more appropriately raised in collateral proceedings under 28 U.S.C. § 2255")); *United States v. Scott*, 26 F.3d 1458, 1467 (8th Cir. 1994) (declining to consider ineffective assistance of counsel claims raised for first time on direct appeal where claim not raised in a motion for postconviction relief pursuant to 28 U.S.C. § 2255). Thus, the underlying merits of all of Kosek's claims lie in whether Kosek can demonstrate ineffective assistance of his counsel. Therefore, the court will address Kosek's specific claims after briefly reviewing the standards of for a claim of ineffective assistance of counsel.

1. Standard for ineffective assistance of counsel

In order to prove a claim of ineffective assistance of counsel, a convicted defendant must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "the deficient performance prejudiced the defense." *Id.* at 687*; Furnish v. United States of America*, 252 F.3d 950, 951 (8th Cir. 2001) (stating that the two-prong test set forth in *Strickland* requires a showing that (1) counsel was

constitutionally deficient in his or her performance and (2) the deficiency materially and adversely prejudiced the outcome of the case); *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001) (same). Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Indeed, "counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). However, there is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy. *Strickland*, 466 U.S. at 689; *see Collins v. Dormire*, 240 F.3d 724, 727 (8th Cir. 2001) (in determining whether counsel's performance was deficient, the court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .") (citing *Strickland*). With respect to the "strong presumption" afforded to counsel's performance, the Supreme Court specifically stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689 (citations omitted).

To demonstrate that counsel's error was prejudicial, thereby satisfying the second prong of the *Strickland* test, a habeas petitioner must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The court need not address whether counsel's performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing "[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness."). The Supreme Court has stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

2. Specific claims

a. Methamphetamine as schedule III drug

Defendant Kosek asserts that his counsel was ineffective for failing to challenge his conviction for methamphetamine as a schedule II drug. On July 7, 1971, the Director of the Bureau of Narcotics and Dangerous Drugs, on behalf of the Attorney General, reclassified methamphetamine from a schedule III drug to a schedule II drug based on its high potential for abuse relative to other substances. *See* 36 F.R. 12734, 12735 (July 7, 1971); 21 C.F.R. § 1308.12(d). While 21 U.S.C. § 812(c), which lists the drug classification schedule, classifies methamphetamine as a schedule II drug when it is contained in "any injectable liquid," it classifies methamphetamine as a schedule III drug when it is in any other form. Federal courts of appeals have uniformly held that "the

reclassification of methamphetamine as a schedule II substance applies to all forms of methamphetamine in accordance with 21 C.F.R. § 1308.12(d) despite the statute's distinction." *United States v. Macedo*, 371 F.3d 957, 981 (7th Cir. 2004); *accord United States v. Roark*, 924 F.2d 1426, (8th Cir. 1991) (holding that methamphetamine was properly classified as schedule II controlled substance and that transfer of methamphetamine from schedule III to schedule II controlled substance was accomplished through correct procedures and supported by necessary findings); *see also United States v. Gori*, 324 F.3d 234, 240 (3d Cir. 2003) (reasoning that 21 C.F.R. § 1308.12(d) must supercede 21 U.S.C. § 812(c)'s schedule classification as the Attorney General acted pursuant to express authorization and the regulation was properly promulgated); *United States v. Segler*, 37 F.3d 1131, 1133 (5th Cir. 1994) (holding that transfer of methamphetamine from Schedule III to Schedule II satisfied requirements of statute permitting Attorney General to transfer drugs between schedules); *United States v. Greenwood*, 974 F.2d 1449, 1472 (5th Cir. 1992) ("Since the early 1970s, as a matter of law, methamphetamine has been classified as a schedule II controlled substance."); *United States v. Allison*, 953 F.2d 870 (5th Cir.) (holding rescheduling of methamphetamine from Schedule III to Schedule II had been properly accomplished), *cert. denied*, 504 U.S. 962 1992); *United States v. Kendall*, 887 F.2d 240, 241 (9th Cir. 1989) (holding that Director of the Bureau of Narcotics and Dangerous Drugs had authority to reschedule all forms of methamphetamine to Schedule II in 1971). Thus, Kosek cannot establish that he was prejudiced by his attorney's failure to challenge his conviction for methamphetamine as a schedule II drug. Therefore, this part of defendant Kosek's motion is **denied.**

b. Career offender status

Defendant Kosek also asserts that his counsel was ineffective for failing to challenge

Kosek being sentenced as a career offender pursuant to U.S.S.G. § 4B1.1.[1] The career offender provision found in § 4B1.1 states, in relevant part: "If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI." U.S.S.G. § 4B1.1. The table specified in the provision contains offense levels geared to the maximum sentence under the statute of conviction. In enacting § 4B1.1, Congress intended career offenders to "receive a sentence of imprisonment at or near the maximum term authorized." U.S.S.G. § 4B1.1 comment. (quotation marks omitted).

To be deemed a career offender under the guidelines, (1) a defendant must have been at least eighteen years old at the time he committed the offense for which he is being sentenced, (2) that offense must be a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant must have at least two prior felony convictions for either a crime of violence or a controlled substance offense. *See* U.S.S.G. § 4B1.1. Only factor three is at issue here. Under the Guidelines, a "controlled substance" offense is

> an offense under federal or state law, punishable by

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[1] At the time of defendant Kosek's sentencing, section 4B1.1 of the Sentencing Guidelines provided, in relevant part:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1.

> imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b).

In determining whether a state conviction counts as a predicate for a career offender enhancement, a federal sentencing enhancement provision such as the career criminal guideline here at issue is interpreted according to a uniform, national definition, not dependent upon the vagaries of state law. *See Taylor v. United States*, 495 U.S. 575, 591-92 (1990). This single-definition approach rests on the cognition that "'application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control.'" *Id.* at 591 (quoting *United States v. Turley*, 352 U.S. 407, 411 (1957)).

The court concluded that Kosek's 1994 Iowa state court conviction for promoting a gathering where a controlled substance would be distributed, in violation of Iowa Code § 124.407, was a predicate controlled substance offense for the purposes of the career criminal enhancement. Kosek maintains that it is possible that he was convicted only for aiding and abetting the possession of controlled substances, not distributing them, so that the 1994 conviction does not count for purposes of the career criminal enhancement. Although Kosek correctly asserts simple possession drug offenses are not included, *see United States v. Baker*, 16 F.3d 854, 856 (8th Cir. 1994), Kosek was not convicted of simple possession, but rather of promoting a gathering where a controlled substance would be distributed.

In *United States v. Hernandez*, 145 F.3d 1433 (11th Cir. 1998), the Eleventh Circuit

Court of Appeals decided an issue similar to the one this court is asked to determine here. In *Hernandez*, a jury found the defendant guilty of, among other things, possession of cocaine with intent to distribute. In the presentencing report, the probation officer applied the career offender provision of U.S.S.G. § 4B1.1 as a result of two prior controlled substance convictions. The defendant challenged the use of the convictions as outside the scope of a controlled substance offense for § 4B1.1 purposes. The statute that the defendant was convicted under stated that "'it is unlawful for any person to sell, purchase, manufacture, deliver, or possess with the intent to sell a controlled substance.'" *Id.* at 1440. The defendant's plea of nolo contendere to both charges did not specify whether his convictions were for the purchase or the sale of controlled substances. The difference was significant because a conviction for purchasing did not qualify as a controlled substance offense for § 4B1.1 enhancement purposes, while a conviction for sale did. The Eleventh Circuit Court of Appeals held that although the district court improperly considered the arrest affidavits in determining whether the convictions were for purchasing or selling, a sentencing court could look beyond the words of the statute to determine if an offense qualifies as a predicate for § 4B1.1 enhancement purposes. Here, it is noteworthy that defendant Kosek does not dispute that his conviction under § 124.407 was for conduct that facilitated the attempted distribution of a controlled substance. Thus, the conduct for which Kosek was convicted under §124.407 involves the attempted distribution of a controlled substance, qualifying as a predicate offense for the determination of career offender status under U.S.S.G. § 4B1.1. As a result, Kosek cannot establish that he was prejudiced by his attorney's failure to raise this issue on direct appeal. Therefore, this part of defendant Kosek's motion is also **denied.**

c. Rule 35(b) motion

Defendant Kosek also asserts a claim of ineffective assistance of counsel on counsel's

failure to seek a downward departure under Rule 35(b). Defendant Kosek's claim is not meritorious, however. The plea agreement in this case specifies that such a motion may only be brought upon motion of the United States. Furthermore, if the United States exercised its discretion to seek a Rule 35(b) departure, it is solely within the court's discretion whether to grant the motion. Thus, it was entirely proper for defense counsel not to seek a Rule 35 departure, as the decision lies entirely with the prosecutor and the court. Since defendant Kosek fails to satisfy the cause requirement of *Strickland*, this claim of ineffective assistance of counsel fails. Therefore, this part of defendant Kosek's motion is also **denied.**

C. Certificate Of Appealability

Defendant Kosek must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability in this case. *See Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U .S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller-El* that "'[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 123 S. Ct. at 1040 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court determines that Kosek's petition does not present questions

of substance for appellate review, and therefore, does not make the requisite showing to satisfy § 2253(c). *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). With respect to Kosek's claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

III. CONCLUSION

Defendant Kosek's § 2255 motion is **denied**, and this matter is **dismissed in its entirety**. Moreover, the court determines that the petition does not present questions of substance for appellate review. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 28th day of September, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA